roll was transmitted to the third auditor to be *filed* to await the passage of an Act of Congress which should provide for the payment of the fraudulent claims contained therein. It was not filed as a claim against the United States; on the contrary, the debt to the persons named in the roll was the debt of the state, and would remain such unless Congress should assume it. It could not be known that such assumption would ever be made, or if made that the said rolls would have any legal significance or value.

However fraudulent in ulterior design, or morally reprehensible, the acts charged in the indictment may be, still our judgment is that sect. 5440 of the Revised Statutes cannot be extended to a case where the fraud which the conspiracy contemplated can only be effected in case an Act of Congress shall be thereafter passed of a nature to fit the prior conspiracy and give it something to feed upon. The demurrer to the indictment must be sustained.

KREKEL, J., concurred.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]
SUPREME COURT OF ERRORS OF CONNECTICUT.[2]
SUPREME COURT OF KANSAS.[3]
SUPREME COURT OF NEW JERSEY.[4]
SUPREME COURT OF RHODE ISLAND.[5]
SUPREME COURT OF WISCONSIN.[6]

ACTION. See *Sunday*.

Founded on Act forbidden by Statute.—When a plaintiff's cause of action arises from a violation of law on his part, his suit cannot be sustained, and it is immaterial whether the violation of law appears from the plaintiff's direct evidence, or is elicited from him by legitimate cross-examination: *Smith* v. *Rollins*, 11 R. I.

Violation of Municipal Ordinance.—The violation of a duty imposed by a municipal ordinance, and sanctioned by a fine, will not support an action on the case for special damages in favor of one injured by the violation and against the violator: *Heeney* v *Sprague*, 11 R. I.

[1] Prepared expressly for the American Law Register, from the original opinions filed during Oct. Term 1877. The cases will probably be reported in 5 or 6 Otto.

[2] From John Hooker, Esq., Reporter; to appear in 44 Connecticut Reports.

[3] From Hon. W. C. Webb, Reporter; to appear in 18 or 19 Kansas Reports.

[4] From G. D. W. Vroom, Esq., Reporter; to appear in 10 Vroom's Reports.

[5] From Arnold Green, Esq., Reporter; to appear in 11 Rhode Island Reports.

[6] From Hon. O. M. Conover, Reporter; to appear in 42 Wisconsin Reports.

A municipal ordinance required the removal of snow, &c., from sidewalks, by the owner of the adjoining premises, and prescribed a penalty for neglect. H., being injured by a fall on a sidewalk, slippery with snow which had not been removed, sued S., the owner of the adjoining premises, claiming that S. was liable in damages to H. on account of the violation of the ordinance by S. *Held*, that the action would not lie: *Id.*

ADMINISTRATOR. See *Decedents' Estate.*

AGENT. See *Contract.*

Contract under Seal in his own Name.—An agreement for the purchase and sale of realty was made between E. J. and M. of the first part, and D., "in behalf of the city of Providence," of the second part. It was signed by all the parties in their own names and sealed with their own seals. On demurrer to a bill for specific performance filed by the city of Providence: *Held*, that the contract was that of D. personally, and not that of the city: *City of Providence* v. *Miller*, 11 R. I.

Held, further, that the words "in behalf of the city of Providence," though indicating a beneficial interest on the part of the city, neither made it a party to the contract nor entitled it to sue as such: *Id.*

Held, further, that the fact admitted at the hearing, though not charged in the bill, that D. was mayor of the city of Providence when the contract was made and signed, was unimportant: *Id.*

Semble, that the general rule, that a contract made by a public officer in his official capacity in behalf of the public will not bind such officer personally, does not apply to officers of a municipal corporation, which can contract for itself and be sued on its contracts: *Id.*

Authority of—Acquiescence by, may estop Principal.—M. gave B. a power of attorney to lease his real estate, collect rents, and institute all legal proceedings that he should think necessary. Under this power B. had the care of certain premises leased by M. to T., the lease limiting the use to the keeping of a lager beer saloon, and the lessee covenanting to use the premises for no other purpose. During the term T., at considerable expense, built a small kitchen in the rear, and fitted up a restaurant on the premises. B. knew of his expending money in the alteration and made no objection until two months afterwards. M. afterwards brought a petition for an injunction to stop the use of the premises by T. for a restaurant. *Held*, 1. That if M. personally had known of the outlay being made by T. and had made no objection, he would be held to have assented to the new use of the premises. 2. That B., under the power of attorney, so far represented M. that his knowledge and acquiescence were the knowledge and acquiescence of M: *Malley* v. *Thalheimer*, 44 Conn.

ARBITRATION.

Agreement for—Effect of.—Where several persons enter into a written contract, stipulating that each shall keep up his own cattle, and prevent the same from trespassing upon or injuring the crops or hedges of any of the others, for the period of three years, and that in case any injury should occur by reason of the cattle of any one of said persons trespassing upon the crops or hedges of any of the others, and in case the parties

themselves could not agree upon the amount of the damages sustained, then, that the question as to the amount of such damages should be submitted to arbitrators, consisting of three of the signers to said contract, one of such arbitrators to be selected by each of the parties, respectively, and the third one to be selected by the other two arbitrators, and that the decision of such arbitrators should be final between the parties: *Held*, that such contract is valid and binding: *Berry* v. *Carter*, 18 or 19 Kans.

And in such a case, where the cattle of B. (one of the parties to said contract), trespasses upon the crops of C. (another of the parties to said contract), and injure said crops, and B., on the demand of C., refuses to pay any damages, and refuses to recognise said contract as having any force or validity: *Held*, that C. may immediately, and without offering to submit the question of damages to arbitrators, commence an action against B. for the amount of such damages. B., by refusing to recognise the validity of said contract, waives his right to have the amount of said damages determined by arbitrators under the contract: *Id.*

And under said contract, it makes no difference, with reference to C.'s right to recover, whether C.'s crops were fenced or not: *Id.*

Where B.'s cattle trespass upon the crops of C. and C.'s cattle upon the crops of B., these mutual trespasses do not in and of themselves rescind or destroy said contract, or render any of its stipulations inoperative: *Id.*

And where C.'s cattle trespass upon the crops of B., and B. does not claim that his crops were fenced, or that C. drove his cattle on to said crops, or that B. was willing or that C. was unwilling to submit the question of damages to arbitrators under the contract; *held*, that B. has no cause of action against C. for said damages; that before B. can have a cause of action against C. in such a case, he must be willing and C. unwilling to submit the question of damages to arbitrators in accordance with said contract: *Id.*

ATTORNEY. See *Mortgage.*

Communications between Client and—Privilege.—On the trial of a defendant charged with the crime of bigamy, the defendant testifying in his own behalf, was required by the court to answer on cross-examination the following question: "If he had not consulted or been advised by his counsel in regard to obtaining a copy of a decree of divorce alleged to have been granted prior to the second marriage?" against the objection of the defendant that the communications between himself and his attorneys were privileged. *Held*, the court erred, as the defendant had not referred to any consultation or advice in connection with his attorneys in his direct examination, and that the communications were privileged: *Held, also*, that all communications which an attorney is precluded by statute from disclosing, his client cannot be compelled to disclose against his objection of privilege: *State* v. *White*, 18 or 19 Kans.

BILLS AND NOTES. See *Municipal Bonds.*

Diligence in Presentation—Burden of Proof—Parol Evidence to affect Liability.—In an action by the endorsee against the endorser of a promissory note, which was not presented to the maker for payment at maturity, the burden is upon the plaintiff to show that the maker had

then removed from the state, or that due diligence was used to find him or ascertain his place of residence: *Eaton* v. *McMahon*, 42 Wis.

The endorser cannot show, against the endorsee, a parol agreement between them at the time of the endorsement, that the same should be without recourse: *Id.*

CHARITY.

Uncertainty.—A will, having created a trust, and given sundry legacies under the trust, made the following provision with regard to the residue: "It is my will that said trustee shall dispose of such remainder for any and all benevolent purposes that he may see fit." *Held* to be void for uncertainty: *Adye* v. *Smith*, 44 Conn.

It does not help the will in such a case for the trustee to designate certain charitable purposes to which he proposes to apply the property. The question is not whether the trustee may apply the estate to such purposes, but whether he is bound to do so: *Id.*

CONFLICT OF LAWS.

Comity—Effect given to Foreign Laws.—The plaintiff, a citizen of Rhode Island, attached in this state a debt due from a resident of this state to a corporation located in the state of Pennsylvania. Previous to the attachment the corporation had gone into insolvency under the insolvent laws of that state, and had under those laws made an assignment of all its effects to a trustee for the benefit of its creditors, and notice of the assignment had been given to the Connecticut debtor. *Held*, that the trustee in insolvency did not acquire a title to the debt that was good against the attachment: *Paine* v. *Lester*, 44 Conn.

The giving effect in this state to the laws of a sister state or foreign country, in the case of the transfer of or succession to personal property within the limits of the state, is wholly an act of comity, and not a recognition of a right: *Id.*

This comity our courts will extend where there is no interest of our own citizens, or of the citizens of other states who are seeking to avail themselves of the benefit of our laws, to be injuriously affected by it: *Id.*

Where such interests exist, the courts owe a legal duty to the parties so interested, which is more imperative than the demands of mere comity: *Id.*

The citizens of other states coming into this state to avail themselves of our laws for the protection of their rights are, by the constitution of the United States, entitled to the same aid from our courts that one of our own citizens would be entitled to: *Id.*

CONSPIRACY. See *Criminal Law.*

CONSTITUTIONAL LAW. See *Taxation.*

Corporation—Contracts by State—Repeal or Alteration of—Taxation.—A statute of a state which declares that all charters of corporations granted after its passage may be altered, amended or repealed by the legislature, does not necessarily apply to supplements to a charter already passed, though the supplement be subsequent to the statute: *The State of New Jersey, The Morris and Essex Railroad Co.* v. *Jas. S. Yard, Commissioner of Railroad Taxation of the State of New Jersey*, S. C. U. S., Oct. Term 1877.

Nor does a provision in a supplement to the charter, which says that "*this supplement, and the charter to which it is a supplement*, may be altered or amended by the legislature," apply to a contract with the company made in a supplement passed long after: *Id.*

Such reservations of the right to repeal found in statutes, unlike similar provisions in the constitution of a state, are only binding on succeeding legislatures so far as they choose to adopt them, and a legislative contract may be made which is not repealable if the legislature so intend. It is, therefore, in every case a question whether the legislature making the contract intended that the former provision for repeal or amendment should become a part of the new contract by implication: *Id.*

In this case the contract for a specific rate of taxation was inconsistent with any such implication, because,

1. There was a subject of dispute and a fair adjustment of the controversy for a valuable consideration on both sides.

2. The contract assumed, by the requirements of the legislation, the shape of a formal written contract signed by both parties.

3. The terms of the contract, that "this tax shall be in lieu and satisfaction of all other taxation or imposition whatsoever by or under the authority of this state or any law thereof," when viewed in the light of the whole transaction, do not admit the idea of the right of the state to revoke it at pleasure: *Id.*

CONTRACT. See *Constitutional Law.*

Work to be satisfactory to one Party—Agent.—The plaintiff, a sculptor, made a plaster bust of the deceased husband of the defendant, under an agreement that she was not to be bound to take it unless she was satisfied with it. When it was finished she was not satisfied with it and refused to accept it. In a suit for the price agreed it was found that the bust was a fine piece of work, a correct copy of a photograph furnished by the defendant, and that it accurately portrayed the features of its subject: and that the only fault found with it was that it did not have the expression of the deceased when living, which was caused by no imperfection in the work but by the nature of the material. *Held*, that the plaintiff was not entitled to recover: *Zaleski* v. *Clark*, 44 Conn.

As the bust was to be satisfactory to the defendant, it was for her alone to determine whether it was so, and it was not enough that her dissatisfaction was unreasonable: *Id.*

The order for the bust was procured by a third person, who had a general authority to solicit orders for the plaintiff, but none to make such a condition. *Held*, 1. That such a general authority would seem to be sufficient to authorize the agent to agree upon the terms of the contract. 2. But that, if the authority was not sufficient, the result would be that there was no special contract, and as the defendant had not accepted the bust there was no sale, and no liability on the part of the defendant: *Id.*

CORPORATION. See *Constitutional Law.*

Powers of.—There is a material difference between such an artificial creation as a corporation and a natural person. The latter can do anything not forbidden by law. The former can do only what is authorized by its charter. Where several corporations, existing by virtue of separate charters, are consolidated by a new charter, the old corporations

cease to exist and the new one commences its existence with only such powers as its own charter gives it. It takes nothing by transmission from any of the old corporations out of which it was created, except so far as the new charter by express terms or necessary implication adopts and renews them: *Shields* v. *State of Ohio*, S. C. U. S., Oct. Term 1877.

When Stockholder may bring Suit for the Corporation—Release of Fraud of Officer.—In case a corporation on request refuses or neglects to bring suit against a defaulting officer, such suit may be brought by a stockholder for himself and his co-stockholders, making the corporation a party respondent: *Hazard* v. *Durant*, 11 R. I.

A corporation cannot gratuitously condone or release the fraud of a defrauding officer, except by a unanimous vote of its stockholders: *Id.*

CRIMINAL LAW. See *Forcible Entry.*

Lotteries.—"Auction pools," "French pools" and "combination pools," upon horse-races, are lotteries within the New Jersey Crimes Act: *State* v. *Lovell*, 10 Vroom.

Conspiracy—Partnership.—A combination between one member of a partnership and a third person, to issue and put in circulation the notes of the firm, drawn by such partner for the purpose of paying his individual debts, the intention of the combination being fraudulent, is an indictable conspiracy: *State* v. *Cole*, 10 Vroom.

Violation of Statutory Duty by Public Officer.—Where a statute specifically defines what acts shall constitute a misdemeanor, it is sufficient in the indictment to bring the defendant within the statutory description of the crime. The distinction is between cases where a legislative act forbids a ministerial officer to do an act, which, by reason of such prohibition, becomes indictable at common law, and cases where the statute declares what shall be indictable. In the former case, under the common law, allegation of corrupt intent or guilty knowledge is essential in the indictment; in the latter it is otherwise: *State* v. *Halsted*, 10 Vroom.

Ignorance of the law is no excuse for crime. The case of *State* v. *Cutter*, 7 Vroom 125, distinguished: *Id.*

Violation of Statutory Duty by Public Officer—Intent.—Section 159 of the charter of Jersey City (Laws 1871, p. 1160) forbids any board or department of the city government to make a contract for work or materials without previous advertisement for proposals, with certain exceptions. *Held*, that although this section does not make the breach of its terms a crime, it is indictable: *State* v. *Startup et al.*, 10 Vroom.

The violation of a prescribed public duty by a ministerial officer is indictable, without being made so in terms by statute: *Id.*

In the absence of express words in the statute making the act criminal, the indictment must charge that the offence was committed with an evil intent or wilfully: *Id.*

The indictment should negative provisoes in the statute which constitute exceptions to the duty imposed: *Id.*

Where an indictment charges a crime, made such by statute, it is sufficient to charge it in the words of the statute, without a particular

statement of facts and circumstances, when the offence is thereby described without ambiguity and uncertainty, or there may be such a particular statement of facts as will bring the accused within its operation. *Id.*

A clear legal intent, by a repeal of the act imposing a penalty or constituting a crime, or some other expressed purpose, is necessary to annul a penalty or condone a crime: *Id.*

DAMAGES. See *Master and Servant.*

DECEDENTS' ESTATE.

Agreement of Administrator not binding on Estate— Will.—An administrator is merely the agent or trustee of the estate of the decedent, acting immediately under the direction of the law prescribing his duties, regulating his conduct and limiting his powers: *Gollamore* v. *Wilder*, 18 or 19 Kans.

An agreement between a creditor of an estate and the administrator thereof, to the effect that no further action should be had in Kansas towards the establishment of a demand of the creditor, beyond legally exhibiting to said administrator said claim, until the determination of a suit pending in another state, on the same claim against the executor of the same estate, and that the determination of said suit in such other state should settle the matter here, is not binding on the estate, nor on the heirs of said estate: *Id.*

The formal and general language in a will requiring that all the just debts of a decedent should be paid by his executors out of his estate, cannot be successfully invoked in behalf of a person, who, having a just claim against such testator, neglects the legal proof of his demand until more than three years have elapsed after the issuance of letters testamentary and the estate has been finally settled according to the provisions of law, and the administration closed: *Id.*

DEED.

Escrow—Requisites of.—The conditions upon which an *escrow* was to be delivered to the grantee therein named, may rest in and be proved by parol: *Campbell* v. *Thomas*, 42 Wis.

Where the grantor in the deed retains the right of control over it, notwithstanding its deposit with a third person with instructions to deliver it to the grantee upon his compliance with specified conditions, it is *not an escrow: Id.*

The mere facts that such deposit was made in pursuance of a previous *oral* agreement between the grantor and the grantee for a sale of the land (void by the Statute of Frauds), and that a small part of the agreed price was paid at the time of such agreement, will not deprive the grantor of his right of control over the deed: *Id.*

Such a deposit makes the deed an escrow, 1. Where there is a prior valid contract between the parties named in the deed, for the sale of the land. 2. Where the delivery of the deed to the depositary itself passes title to the grantee, as where the condition of its delivery to him by the depositary is a future *certain* event, and the grantee assents to the first delivery: *Id.*

DOWER.

Lands aliened by Husband—Time at which Value to be determined.—When dower is to be assigned in estates aliened by the husband, the widow is to be endowed according to their value at the time of the assignment, deducting the enhancement by the purchaser's improvements, but allowing for all other increase in value: *Wescott* v. *Campbell*, 11 R. I.

A., whose husband died in 1863, claimed dower in a mill estate alienated by him some years before. In 1871, the mill, being fully insured, was burned down, and was rebuilt in 1873. *Held*, that she was entitled to dower in the value of the estate at the time of the dower assignment; that she must suffer the depreciation of value by the fire; and that she was not entitled to dower in the value given to the estate by the rebuilding: *Id.*

EASEMENT.

Evidence—Claim of Right.—Upon the question whether a certain alley-way, which had long been used in connection with a dwelling-house on which it abutted, had been acquired by adverse possession: *Held*, that a claim of right made while using the alley by a former owner of the house from whom the present claimant derived title, though inadmissible as a claim of right, was yet admissible as giving character to the use of the alley and showing it to have been adverse: *Turner* v. *Baldwin*, 44 Conn.

EQUITY. See *Municipal Corporation.*

Nature of Cross-Bill—Appeal from final Decree.—Both the original and cross-bill constitute one suit and ought to be heard at the same time. Consequently any decision or decree in the proceedings upon the cross-bill is not a final decree in the suit and not the subject of an appeal. The decree, whether maintaining or dismissing the bill, disposes of a proceeding simply incidental to the principal matter in litigation, and can only be reviewed on an appeal from the final decree disposing of the whole case. That appeal brings up all the proceedings for re-examination, when the party aggrieved by any determination in respect to the cross-bill has the opportunity to review it, as in the case of any other interlocutory proceeding in the case: *Ex parte North and South Alabama Railroad Co.*, S. C. U. S., Oct. Term 1877.

A cross-bill must grow out of the matters alleged in the original bill, and is used to bring the whole dispute before the court, so that there may be a complete decree touching the subject-matter of the action: *Id.*

Reformation of Deed—Rights of Third Persons acquired in good faith not affected.—In 1866 the appellee, Montgomery, being indebted to Estlin & Co., made promissory notes to his own order, and payable respectively, one, two, three, four and five years from date, with interest until paid, endorsed them in blank and secured them by a deed of trust of certain lands therein described. He delivered the notes so endorsed and the deed of trust to Estlin & Co. They transferred the notes in the course of business to other parties. Portions of them were held by each of the several complainants, whose bill was filed to enforce the deed of trust. The defendants in their answers set up another deed of trust executed by Montgomery in 1848, to secure certain other liabilities of his,

therein set forth. The lands covered by this deed of trust were described as in *range nine*, while all those except one tract embraced in the other deed were described as in *range eight*. With this exception, the description in the earlier deed applied to the lands described in the later one. The defendants insisted that the number of the range in the first deed was a mistake of the scrivener who drew it, that the number was intended to be *eight* instead of nine, and they insisted that the instrument should be reformed accordingly, and that the liabilities intended to be secured by it should be made the first lien upon those premises. There was neither allegation nor proof that the complainants or the other holders of the notes delivered to Estlin & Co. had any notice of the alleged mistake when they took the paper, nor was there any averment or proof of such notice to the trustee when the deed was delivered. *Held*, that as between Montgomery, the grantor in the prior deed, and the *cestui que trust* under that deed, the deed might have been reformed and enforced as corrected, but this could not be done against the intervening rights of others acquired in good faith: *New Orleans Canal and Banking Co. et al.* v. *Montgomery et al.*, S. C. U. S., Oct. Term 1877.

ESTOPPEL.

Who may take advantage of—Where a declaration is made to one person for the purpose of influencing his conduct, and though not confidential is not intended for others, a bystander who overhears it and acts upon it cannot set up an estoppel against the party making the declaration: *Kinney* v. *Whiton*, 44 Conn.

EVIDENCE. See *Bills and Notes; Easement.*

Parol, to affect Writing.—When a contract is first made by parol for the sale and purchase of a horse, and a paper subsequently drawn up and signed by the agent of the vendor, not as containing the terms of the contract, but being on its face and plainly intended to be nothing more than a receipt for the purchase-money, parol evidence is admissible of representations as to the soundness of the horse, made by the agent of the vendor at the time of the sale: *Perrine* v. *Cooley*, 10 Vroom.

FORCIBLE ENTRY.

What may amount to.—A., with the aid of six or eight men, hastily tore down a part of the fences around a lot which had been for a year and a half in the peaceable possession and occupation of B., and with great haste moved thereon a shop in the absence of B. and his family from his premises, and without personal violence or intimidation toward any person, but without the consent of B.: *Held*, that the jury were warranted in finding a forcible entry: *Steinlein* v. *Halstead*, 42 Wis.

B. afterwards went to the shop, which was occupied by A., with several workmen, and informed A. that he had taken possession unlawfully, and requested him to remove without delay; and A. answered that "no one could get him away unless he were forced to go by law." *Held*, that this language imported that A. would resist by force all attempts to remove him except through legal process; and warranted the jury in finding a forcible detainer. *Carter* v. *VanDorn*, 36 Wis. 289, distinguished: *Id.*

FOREIGN JUDGMENT.

Attestation of—Act of Congress.—It seems that the attestation of a foreign record, under section 905 of the Revised Statutes of the United States, must be made by the clerk in person and cannot be made by a deputy or other person acting as a substitute for him: *K. P. Railway Co.* v. *Cutter, Admx.*, 18 or 19 Kans.

FRAUDS, STATUTE OF. See *Sale.*

HARBOR LINE. See *Waters.*

HIGHWAY. See *Action; Municipal Corporation.*

HUSBAND AND WIFE.

Grant includes purchase by Bargain and Sale — Presumption as to Wife's Estate.—In the statute which declares that a married woman "may receive by inheritance, or by gift, grant, devise or bequest, from any person other than her husband, and hold to her sole and separate use," real and personal property (R. S., ch. 95, sect. 3), the word *grant* includes deeds of bargain and sale of land: *Mc Vey* v. *G. B. & Minn. Railway Co.*, 42 Wis.

Where a conveyance is made by a stranger to a married woman, the presumption, in the absence of proof, is that the consideration was paid by her and not by her husband: *Id.*

Divorce—Insanity.—Insanity, occurring after marriage, is not cause for divorce, and nothing which is a consequence of it can be, and, *Held*, that neither is impotency caused by such insanity, nor extreme cruelty, while so insane, ground for divorce: *Powell* v. *Powell*, 18 or 19 Kans.

A marriage with an insane person is absolutely void, for want of sufficient mental capacity on the part of such insane person to consent to the marriage: *Id.*

If a marriage is void by reason of the insanity of either of the contracting parties, while no judgment annulling such marriage as void *ab initio* is necessary to restore the parties to their original rights, yet a sentence of nullity in such a case is conducive to good order and decorum, and to the peace and conscience of the party seeking it: *Id.*

INSANITY. See *Husband and Wife; Insurance.*

INSURANCE.

Defence to Policy—Insanity.—It is not every kind or degree of insanity which will so far excuse the party taking his own life as to make the company insuring liable; to do this, the act of self-destruction must have been the consequence of insanity, and the mind of the deceased must have been so far deranged as to have made him incapable of using a rational judgment in regard to the act which he was committing. If he was impelled to the act by an insane impulse, which the reason that was left him did not enable him to resist, or if his reasoning powers were so far overthrown by his mental condition that he could not exercise his reasoning faculties on the act which he was about to do, the company is liable. On the other hand, there is no presumption of law, prima facie or otherwise, that self destruction arises from insanity: *Charter Oak Life Insurance Co.* v. *Rodel*, S. C. U. S., Oct. Term 1877.

MANDAMUS.

Not available to enforce Contract Rights of Private Nature.—A writ of mandamus is not an appropriate remedy for the enforcement of contract rights of a private nature: *Parrott* v. *City of Bridgeport*, 44 Conn.

It is granted only to prevent a failure of justice in cases where ordinary legal processes furnish no relief: *Id.*

The writ refused where applied for to compel a city to construct a public street (which had been laid out, but not opened) in a certain special manner, not required by law, but which it was averred had been agreed to by the city and taken into consideration in the assessment of the petitioner's damages and benefits: *Id.*

MASTER AND SERVANT.

Violation of Duty by Servant.—If a servant, without his master's consent, engage in any employment or business for himself or another, which may tend to injure the master's trade or business—as in one which brings him in direct competition with the master, giving him a hostile interest—he may lawfully be discharged before the expiration of the agreed term of service, even though he may so conduct such other business, by agents or otherwise, that it does not interfere with the time and attention due the business of his employer: *Dieringer* v. *Meyers*, 42 Wis.

Liability of Master for Torts of Servant—Railroad—Exemplary Damages.—A principal is liable in compensatory damages for injuries done by his servant acting within the scope of his employment; and if the act is such that the servant would be liable in punitory damages, if the action were against him, the principal is liable in damages of that character in case he authorized the act or subsequently ratified it, but not otherwise: *Bass* v. *The C. & N. W. Railway Co.*, 42 Wis.

Where a railroad company retained a brakeman in its service, and even promoted him to a position of greater responsibility, after notice of tortious acts committed by him against a passenger, for which he would be liable in punitory damages, there was no error in submitting to the jury, in an action against the company, the question whether it had ratified such acts: *Id.*

Plaintiff was a passenger upon a train of the defendant company, and there being no vacant seat in any passenger car, except the smoking car and the rear or ladies' car, he entered the latter peaceably, without being forbidden or barred from entering it by any officer or agent of the company; while he was there, and while the train was in motion, a brakeman seized him, and without requesting him to leave the car, or offering him a seat elsewhere, forcibly ejected him from the car upon the platform thereof in a rude and violent manner, though without any intent to inflict bodily injury upon him, and using no more force than was necessary to get him out of the car. *Held*, that the injury was one which, in an action against the brakeman, would sustain a verdict for *punitory* damages: *Id.*

In case of the misconduct of a brakeman toward a passenger on a railroad train, immediate notice to the conductor of the train (by whomsoever given) is notice to the company; and if the conductor or other officer of the company, after such notice, disbelieves the charge made

against the brakeman, still the retention of the latter in its service by the company will be at its peril of the fact: *Id.*

An award of $2500 for compensatory damages in this case, *held* (especially in view of the former verdicts herein), not to be so disproportioned to the injury sustained as to bear marks of passion, prejudice, partiality or corruption in the jury, and therefore not to be excessive: *Id.*

MORTGAGE.

Replevin by Mortgagee for Chattels severed from the Realty.—A mortgagee of real estate whose debt is due, but who has not entered into possession, cannot maintain replevin for a specific chattel, which the mortgagor or his assigns has severed and removed from the realty, and which, before severance, was a fixture or part of the realty and subject to the mortgage: *Kircher* v. *Schalk*, 10 Vroom.

Future-acquired Chattels.—A mortgage of personal property to be subsequently acquired conveys no title to such property when acquired which is valid against the mortgagor or his voluntary assignee, unless after acquisition possession of such property is given to the mortgagee or taken by him under the mortgage: *Williams* v. *Briggs*, 11 R. I.; *Cook* v. *Corthell*, Id.

Although a mortgage of personal property to be subsequently acquired is in itself ineffectual to vest in the mortgagee a legal title to the property, yet if, after acquisition by the mortgagor, the mortgagee, by delivery from, or by consent of, the mortgagor, takes possession of the property under the mortgage conveyance, the title to the property, both in law and equity, vests in the mortgagee without further conveyance or bill of sale: *Id.*

Attorney Fee for Collection.—A mortgage contained a stipulation that upon default in the payment of the debt the mortgage should be "subject to foreclosure according to law, and that an attorney's fee of fifty dollars for foreclosure, with costs of suit and accruing costs, should be taxed against the mortgagor: *Held*, that where, after suit brought, but before decree, the mortgagor paid the debt, interest and costs, the court committed no error in refusing to render judgment in favor of the mortgagee and against the mortgagor for the fifty dollars attorney fee or any part thereof, or in dismissing the action. *Life Association* v. *Dale*, 17 Kans. 185, distinguished: *Jennings* v. *McKay et al.*, 18 or 19 Kans.

MUNICIPAL BONDS.

When negotiable.—Bonds and other securities issued by municipal corporations under legislative authority, as a means of raising money on a credit, and designed to be put in the market, and go into circulation, by commercial usage have obtained the quality and attributes of commercial paper, in respect of their transfer, among which is immunity, in the hands of bona fide holders, from defences to which they would be subject in the hands of the original parties: *Knapp* v. *Mayor and Council of Hoboken*, 10 Vroom.

But ordinary corporation orders, warrants and certificates of indebtedness, which are merely evidences of indebtedness or obligations to pay, are not within this principle. If negotiable in form, they are negotiable

in character, so far as to enable the holder to sue in his own name, but they are not commercial or negotiable paper in the hands of holders, so as to exclude inquiry into the legality of their issue, or preclude defences thereto: *Id.*

A municipal corporation has no power to invest its obligations with the character and incidents of commercial paper, so as to render them unassailable by defences to which they would be subject in the hands of the immediate parties, unless such power is conferred by legislative authority, either express or clearly implied: *Id.*

MUNICIPAL CORPORATION. See *Action; Agent.*

Negligence—Ice on Highway.—A city held liable for an injury from the slippery condition of a sidewalk by reason of ice upon it, where the city had been guilty of negligence in the care of the walk: *Dooley* v. *City of Meriden*, 44 Conn.

Opening Streets—Damage to Property—Equity.—The duty on the part of a city of opening a public street, carries with it the right to determine the grade of the street and the manner of constructing it: *Fellowes* v. *City of New Haven*, 44 Conn.

With the exercise by the city authorities of their discretion in the matter no other tribunal has any right to inferfere, so long as they keep within the limits of their powers: *Id.*

If, in such a case, private property is incidentally damaged, the party injured may or may not be entitled to compensation, according to the circumstances; but such damage, unless possibly in extreme cases, affords no reason for the interference of a court of equity: *Id.*

Where a city, in the discharge of a duty imposed by law, has by adverse proceedings taken land for a public street and paid the damages legally assessed, it is not liable for an injury incidentally and necessarily caused to the adjoining land by the grading and working of the street in a proper manner: *Id.*

It is presumed in such a case that the city, in taking and paying for the land for a street, took, as an incident, a right to establish the grade according to its own judgment, and to bring the street to that grade, without further compensation: *Id.*

Grade of Streets—Liability for Damages to adjacent Owners.—The doctrine that a municipality cannot be held liable for the consequences of an act which it is legally authorized or is required to perform, will not justify an invasion of private property, even if the invasion is only consequential: *Inman* v. *Tripp*, 11 R. I.

The city of Providence, required by statute to keep its streets in good repair and authorized for this purpose to grade them and to change their grades, to make culverts, and to build drains and sewers, so changed the grade of certain streets as to allow surface water, which formerly flowed in other streets, and other surface water, which was formerly ponded at some distance from the plaintiff's estate, to run down the street whereon his estate fronted and thence on to his estate and into his cellar and well. *Held*, that the city was liable for the damages thus caused to the plaintiff: *Id.*

Held, further, that the plaintiff's right of action did not arise from the mere change of grade in the highway, but from the injury suffered in and on his estate resulting from such change: *Id.*

Held, further, that though the act of changing grades or providing sewers, or refusing to change them or to provide them, may involve a discretion, yet that this is not a sufficient defence to an action against the city when private property has been invaded and its use impaired without compensation: *Id.*

NEGLIGENCE. See *Municipal Corporation; Railroad.*

OFFICER. See *Criminal Law.*

PARTNERSHIP. See *Criminal Law.*

RAILROAD. See *Master and Servant.*

Negligence—Duty of approaching Wagon.—If a railroad crosses a common road on the same level, those travelling on either have a legal right to pass over the point of crossing, and to require due care on the part of those travelling on the other to avoid a collision: *Continental Improvement Co.* v. *Stead*, S. C. U. S., Oct. Term 1877.

From the character and momentum of a railroad train and the requirements of public travel by means thereof, it cannot be expected that it shall stop and give precedence to an approaching wagon to make the crossing first; it is the duty of the wagon to wait for the train. The train has the preference and right of way. But it is bound to give due warning of its approach, so that the wagon may stop and allow it to pass, and to use every exertion to stop if the wagon is inevitably in the way: *Id.*

RECOUPMENT.

Sealed Instrument.—There can be no recoupment in a suit on a sealed instrument: *Price's Executors* v. *Reynolds*, 10 Vroom.

REMOVAL OF CAUSES.

Jurisdiction of Federal Courts—Citizenship of Parties.—Where the jurisdiction of the courts of the United States depends upon the citizenship of the parties it has reference to the parties as persons. A petition for removal must, therefore, state the personal citizenship of the parties and not their official citizenship, if there can be such a thing: *Amory* v. *Amory*, S. C. U. S., Oct. Term 1877.

A petition for removal, therefore, setting forth "that said plaintiffs, *as such executors*, are citizens of the state of New York," is clearly insufficient: *Id.*

Time when Citizenship is to be determined.—The citizenship of the parties upon which the right of removal depends means the citizenship of the parties at the time of the *commencement* of the suit: *Phœnix Ins. Co.* v. *Pechner*, S. C. U. S., Oct. Term 1877.

This right of removal is statutory. Before a party can avail himself of it, he must show upon the record that his is a case which comes within the provisions of the statute. His petition for removal when filed becomes a part of the record in the cause. It should state facts which, taken in connection with such as already appear, entitle him to the transfer: *Id.*

REPLEVIN. See *Mortgage.*

RIPARIAN RIGHTS. See *Waters.*

SALE.

Goods ordered by one Party for another.—Where one person orders goods for another, promising to pay for them, the question to which of the parties they were sold, is wholly one of fact: *Spurr* v. *Goffing*, 44 Conn.

Rescission—Statute of Frauds.—A party has no power to rescind a contract of purchase unless there is a provision in it giving him the right to do so. If the property purchased does not answer the terms of the contract, there being no fraud in the case, his only remedy is by a suit for the breach of the contract: *Buckingham* v. *Osborne*, 44 Conn.

Where a contract of sale of personal property is inoperative under the Statute of Frauds for want of delivery, a tender made afterwards, and an unconditional acceptance, have the same effect between the parties as if the delivery had been made at the time of the sale: *Id.*

STATUTE. See *Criminal Law.*

When remedy given by is exclusive.—When a statute creates a new right or liability, and at the same time gives a remedy, the remedy given is exclusive; but when the right or liability was not created by the statute, but would have existed without the statute, the statute remedy is cumulative: *Inman* v. *Tripp*, 11 R. I.

STREET. See *Mandamus; Municipal Corporation.*

SUNDAY.

Action growing out of Illegal Contract.—A statute being in force and providing that "every person who shall do or exercise any labor or business, or work of his ordinary calling, * * * on the first day of the week, or suffer the same to be done * * * by his children, servant or apprentices, works of necessity and charity only excepted, shall be fined not exceeding." * * * S., a livery stable keeper, let, in his ordinary business, a horse and carriage to be driven for pleasure to a particular place. The hirer drove them to a different place, and returned them damaged; whereupon S. brought trover against the hirer: *Held*, affirming *Whelden* v. *Chappel*, 8 R. I. 230, that the action would not lie: *Smith* v. *Rollins*, 11 R. I.

TAXATION. See *Constitutional Law.*

Constitutionality of—Due Process of Law.—The constitutional provision that no state shall deprive any person of life, liberty or property without due process of law, does not require that persons taxed by the law of the state shall be present, or have an opportunity to be present, when the tax is assessed against them: *McMillen* v. *Anderson*, S. C. U. S., Oct. Term 1877.

Nor does it require that taxes shall be collected by a judicial proceeding: *Id.*

A statute which gives the taxpayer a right to enjoin its collection, and have the validity of the tax decided by a court of justice, is due process of law, notwithstanding it requires the party to give security in advance, as in other injunction cases: *Id.*

TORT. See *Master and Servant.*

TRADE MARK.

Use of Party's own Name cannot be enjoined unless Fraudulent—Assignment of Name.—A. C. & Co., being the successors by purchase of Stillman & Co., woollen manufacturers, continued to use "Stillman & Co." as a trade-mark on their ticket for goods. Latimer, Stillman & Co., the lessees of a mill formerly used by Stillman & Co., known both as the "Stillman Mill" and as the "Seventh Day Mill," also used "Stillman & Co." as a trade-mark. On a petition for injunction, brought by A. C. & Co. against Latimer, Stillman & Co., to prevent their so using the words "Stillman & Co.," it appearing that no deception could be charged to either complainants or respondents, and that no person of the old firm of Stillman & Co. was a member of the firm of A. C. & Co. *Held*, that the injunction could not be granted: *Carmichel* v. *Latimer*, 11 R. I.

Held, further, that a manufacturer has the right to label his goods with his own name or that of his mill, if no fraudulent purpose is intended: *Id.*

Query. If a trade-mark whose reputation depends on the excellence of the manufacture, or the skill and honesty of the manufacturer, can be legally assigned? *Id.*

Query. If the English practice of retaining a firm name, when no original partner remains, is generally recognised in American law? *Id.*

TRIAL.

Practice—Reading Law Books to Jury.—Upon an appeal from a probate decree disallowing a will, the question being whether the testatrix was of sound mind, the party upholding the will was allowed by the court, against objection taken, to read to the jury from books cases decided in other states and in England, for the purpose of showing that the facts set forth in such cases were not inconsistent with the soundness of mind necessary to the making of a valid will. *Held*, to be error, and a ground for granting a new trial: *Baldwin's Appeal*, 44 Conn.

WATERS AND WATERCOURSES.

Harbor Line—Title to Land below High-water Mark.—Land bordering on tide-water was platted into house lots, some of which extended below low-water mark, all the lots being defined shoreward by a fixed line, outside of which no lots were platted. Conveyance of these lots was made, and subsequently a harbor line was fixed by the state, running in front of the lots. *Held*, on a trustee's bill for instructions: 1. That the fee of the soil below high-water mark was in the state; 2. That the establishment of a harbor line was permission given by the state to fill out to it; 3. That a grantee of a lot touching tide-water who fills out to the harbor line holds the filled land, not under his grantor, but directly from the state; 4. That the land between high-water mark and any lot not touching high-water mark, with the right to fill to the harbor line, did not pass by the conveyance made: *Bailey* v. *Burges*, 11 R. I.